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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	2
INTEREST OF THE AMICUS CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT—The construction industry proviso to Section 8(e) permits only those hot cargo agreements which have been voluntarily entered within the context of an existing collective bargaining relationship	6
A. The law prior to the 1959 Amendments	6
B. The legislative history of Section 8(e) and the construction industry proviso	12
C. The status of the law after the 1959 Amendments	16
CONCLUSION	23

Cases Cited

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	3
Bangor Building Trades Council, 123 NLRB 484, enforced, 278 F.2d 287 (1st Cir. 1960)	6, 19
Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970)	3
Bricklayers, Masons & Plasterers International Union (Selby-Battersby & Co.), 125 NLRB 1179 (1959)	6, 8-11, 19
Buffalo Forge v. Steelworkers, 428 U.S. 397 (1976)	2

PAGE

Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946 (1963) 17

Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236 (1962) 17

Building and Construction Trades Council of San Bernardino and Riverside Counties, et al. v. N.L.R.B., 328 F.2d 540 (D.C.Cir. 1964) 17

Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212 (1979) 2

Carpenters Local 1976 v. N.L.R.B. (Sand Door), 357 U.S. 93 (1958) 4, 8, 12, 19, 21, 22

Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1975) .. 2-5, 15, 18, 21, 22

Construction, Production and Maintenance Laborers Local 383 (Colson & Stevens), 137 NLRB 1650 (1962), reversed in part, 323 F.2d 422 (9th Cir. 1963) 5, 15-22

Essex County and Vicinity District Council of Carpenters, 141 NLRB 858 (1963) 17

Essex County & Vicinity District Council of Carpenters & Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.) v. N.L.R.B., 332 F.2d 636 (3d Cir. 1964) 17

Gateway Coal Company v. United Mine Workers of America, et al., 414 U.S. 368 (1974) 3

PAGE

Local 47, Teamsters Union (Texas Industries, Inc.), 112 NLRB 923, enforced, 234 F.2d 296 (5th Cir. 1956) 6, 8, 11, 18, 19

Local Union No. 48 of Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964) 17

Local 60, United Association of the Plumbing & Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282 (1962) 17

Local 300, Hodcarriers Union (Fiesta Pools Inc.), 145 NLRB 911 (1964) 16

Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B., 366 U.S. 667 (1961) 15, 22

Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952 (1964) 16

Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458 (1963) 17

Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249 (1963) 17

Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49 (1963) 16

Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279 (1963) 16

N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267 (1974) 3

N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951) 4, 13-15, 21

PAGE

N.L.R.B. v. Enterprise Association, etc., 429 U.S. 507 (1977) 2, 22

N.L.R.B. v. Granite State Joint Board, 409 U.S. 213 (1972) 3

N.L.R.B. v. Int'l Hod Carriers Union, Local 1140, 285 F.2d 397 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961) 14

N.L.R.B. v. Local 825, Operating Engineers, 400 U.S. 297 (1971) 15

N.L.R.B. v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 3

National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612 (1967) 15, 21, 22

New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) 2

Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments), 148 NLRB 854 (1964) 5, 17

Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175 (1963) 17

Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.) v. N.L.R.B., 328 F.2d 534 (D.C.Cir. 1964) 17

Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950) 14, 15

Southern California District of Laborers (Swimming Pool Gunite Contractors), 144 NLRB 978 (1963) 16

Sperry v. Plumbers Local 562, 210 F.Supp. 743 (W.D. Mo. 1962) 14

PAGE

Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz v. Lloyd W. McCorkel, et al., 416 U.S. 115 (1974) 3

United States v. American Trucking Association, 310 U.S. 534 (1940) 21

United Automobile Workers v. Scofield, 382 U.S. 205 (1965) 18

William E. Arnold Co. v. Carpenters District Council of Jacksonville, etc., et al., 417 U.S. 12 (1974) 3

Statutes Cited

29 U.S.C. Sec. 158(e) 3

29 U.S.C. Sec. 158(f) 20

National Labor Relations Act:

Sec. 8(a)(1), (2) and (3) 14

Sec. 8(b)(1)(A) and (2) 14

Sec. 8(b)(4) 12, 13, 20

Sec. 8(b)(4)(A) 6, 8, 9, 11, 19, 20

Sec. 8(b)(4)(B) 6, 8, 12, 20

Sec. 8(b)(7)(C) 14

Sec. 8(e) 3-6, 12-15, 18-20, 22, 23

Sec. 8(f) 10, 14, 20

Other Authorities Cited

Legislative History of Labor Management Reporting & Disclosure Act of 1959 ..... 13, 14

PAGE

Address of NLRB Member Boyd Leedom, Labor Law Section, Illinois State Bar Association, January 19, 1962 (49 LRRM 84) 18

Miscellaneous

H.R. Rep. No. 1147, 86th Cong. (1959) 14
H.R. Rep. No. 9070, 86th Cong. (1960) 16
H.R. Rep. No. 9089, 86th Cong. (1960) 16
H.R. Rep. No. 9373, 86th Cong. (1960) 16
S. Rep. No. 2643, 86th Cong. (1960) 16
H.R. Rep. No. 10027, 89th Cong. (1965) 16
H.R. Rep. No. 100, 90th and 91st Cong. (1967, 1969) .. 16
H.R. Rep. No. 7438, 92nd Cong. (1973) 16
H.R. Rep. No. 4726, 93rd Cong. (1973) 16

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BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Introduction

This brief on behalf of the Chamber of Commerce of the United States of America, as amicus curiae, is filed with the written consent of the parties pursuant to Rule 36.2 of this Court. It is in support of the petitioners, Woelke & Romero Framing, Inc. (hereinafter "Woelke & Romero") and Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (hereinafter "Pacific Northwest"), jointly referred to hereinafter as petitioners.

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 2,600 state and local Chambers of Commerce, 1,200 trade and professional associations, and a direct business membership in excess of 75,600. It is the largest association of business and professional organizations in the United States. The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

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[1] E.g., *Carbon Fuel Co.* v. *United Mine Workers,* 444 U.S. 212 (1979); *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519 (1979); *N.L.R.B.* v. *Enterprise Association, etc.,* 429 U.S. 507 (1977); *Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.*

(Footnote continued on following page)

The questions presented by the instant case are of vital concern to the Chamber and its members. The Chamber participated in the litigation of these cases before the National Labor Relations Board and the United States Court of Appeals for the Ninth Circuit as an amicus.

One of the questions squarely presented is whether a labor organization may lawfully picket or strike to obtain a subcontracting clause under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. Section 158(e). The Chamber regards this issue as the most significant construction industry question to come before this Court since the 1959 amendments to the Act. In the Chamber's view, it goes to the very core of permissible "hot cargo" relationships.

In *Connell*, this Court acknowledged Connell's contention that the construction industry proviso authorizes *only voluntary agreements*. However, because the Court found the agreement there was outside the context of a collective bargaining relationship, the Court found it unnecessary to consider this contention, leaving the issue for resolution in another setting. *Connell Construction Co., Inc.* v.

(Footnote continued from preceding page)

v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 368 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver* Co., 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Plumbers & Steamfitters Local 100, 421 U.S. 616, 634, n.14. Thus, this is the first time since the 1959 amendments that the Court has had the opportunity to address this question—despite the fact that the current law, as enforced by the NLRB and circuits, in our view, overturns *Sand Door*.[2] Therefore, the Chamber shall focus this entire brief upon this single issue.[3]

Summary of Argument

Petitioners and amicus maintain that the construction industry proviso to Section 8(e) permits only *voluntary* agreements entered into within the context of a collective bargaining relationship. That position is supported by Board decisions and the decisions of this Court prior to 1959, the legislative history of Section 8(e), and its initial construction by a unanimous five-member National Labor Relations Board in numerous cases after 1959.

The principles enunciated by this Court in *Denver Building Trades*[4] and *Sand Door* lie at the very core of the Chamber's position. These principles and those established in other pre-1959 authorities were not disturbed by the 1959 amendments. *Therefore, construction industry unions gained no greater rights by the enactment of the proviso to Section 8(e) than they enjoyed prior thereto.*

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[2] *Carpenters Local 1976* v. *N.L.R.B.* (*Sand Door*), 357 U.S. 93 (1958).

[3] Amicus adopts and supports the briefs of petitioners Woelke & Romero and Pacific Northwest with regard to all other issues.

[4] *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

What was unlawful then (coercion to obtain a "hot cargo" clause) is unlawful now. It was necessary to include the proviso to Section 8(e) because, standing alone, Section 8(e) would have abolished such pre-existing rights. *In sum, the rights that construction unions enjoyed prior to the 1959 amendments were saved from extinction by the proviso, not expanded.*

The National Labor Relations Board adopted this view in a long line of cases after the 1959 amendments, beginning with *Construction, Production & Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part, 323 F.2d 422 (9th Cir. 1963). However, following the rejection of its views by some circuit courts, in 1964 the Board reversed its long-standing position. *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964). That decision has spawned and opened the floodgates to "top down" organizing efforts condemned by this Court in *Connell* and has nullified the teachings of *Sand Door.*

The instant cases provide the Court with an opportunity to restore the law to its proper course, consistent with prior precedent and congressional intent.

ARGUMENT

The construction industry proviso to Section 8(e) permits only those hot cargo agreements which have been voluntarily entered within the context of an existing collective bargaining relationship.

A. The law prior to the 1959 Amendments.

Prior to the 1959 amendments and the enactment of Section 8(e), it was well established that a union could not strike to obtain a "hot cargo" subcontractor clause without violating the secondary boycott provisions of the Act. Local 47, Teamsters Union (*Texas Industries, Inc.*), 112 NLRB 923, enforced, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council,* 123 NLRB 484, enforced, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons & Plasterers International Union (Selby-Battersby & Co.),* 125 NLRB 1179 (1959).

This Court's decision in *Sand Door* remains the cornerstone of that principle. In that case, Justice Frankfurter, speaking for the Court, said that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily,* and thus, to engage in a boycott, so long as the union refrains from coercion. Therefore, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited by Section 8(b)(4)(B), formerly Section 8(b)(4)(A) of the NLRA.

Presaging the principles involved herein, Justice Frankfurter observed:

> "A more important consideration, . . . is the possibility that the contractual provision itself may well

not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U.S. 93, 106.

Significantly, the dissent of Justice Douglas in *Sand Door*, which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that if the clause was the product of *voluntary collective bargaining*, it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion.*" 357 U.S. at 112. (Emphasis added.)

And later he added:

> "Certain it is that where he *voluntarily agrees* to the 'unfair' goods clause he is not forced or coerced in the statutory sense." 357 U.S. at 113-114. (Emphasis added.)

Accordingly, it is manifestly clear that before 1959 "hot cargo" agreements could only be obtained *voluntarily and in an atmosphere free from coercion.*

In its brief in opposition to the petition in *Woelke & Romero,* the Board (with only passing mention of *Sand Door*) took issue with the Chamber's contention that prior to the 1959 amendments Board decisional law did not permit picketing or a strike to obtain a "hot cargo" agreement.[5] It will undoubtedly take the same position here. The Board's contentions rest upon an artificial distinction between a "hot cargo" agreement directed at disrupting what it chooses to call ongoing or existing business relationships and an agreement directed at future relationships. In support of that position, the General Counsel relies upon a footnote in the Board's *Texas Industries* decision, in which it declined to decide whether the Union's picketing violated Section 8(b)(4)(A)[6] insofar as it was directed to future dealings between the general contractor and such subcontractors as might, in the future, refuse to meet the union's wage standards. *Local 47, Teamsters Union (Texas Industries, Inc.),* 112 NLRB 923, 925, n. 2 (1955), enforced, 234 F.2d 296 (5th Cir. 1956). However, the General Counsel neglected to point out that the Board later addressed this very question in 1959, when it decided *Bricklayers, Masons & Plasterers International Union (Selby-Battersby),* 125 NLRB 1179 (1959). In that case, Selby, a construction subcontractor-distributor, was struck by constituent locals of the Baltimore Building & Construction Trades Council because Selby refused to incorporate a "hot cargo" agreement in its contract with those locals.

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[5] See the Board's brief in opposition to petitions for certiorari, pages 12-13.

[6] Now Section 8(b)(4)(B).

The "hot cargo" agreement, if accepted by Selby, would have permitted the completion of any jobs underway by non-signatory open shop contractors with whom Selby had existing contracts. However, the "hot cargo" agreement precluded Selby from doing business with any non-signatory open shop contractor at a *future time.* The Board held:

> "As found by the Trial Examiner, the fact that the Standard Agreement permitted the completion of nonunion jobs already underway, and thus [only] sought to disrupt secondary relationships *at a future time, does not detract from or bar a finding of unlawful object under Section 8(b)(4)(A).* The impact of the strike was nevertheless immediate, and there is no question but that the open-shop general contractors, with whom Selby was pressured by the strike to cease doing business, constituted a well-defined identifiable group." (Emphasis added.) 125 NLRB at 1182.

The Board then proceeded to issue an Order, providing that the Building & Construction Trades Council cease and desist from engaging in secondary activity with an object of forcing or requiring Selby-Battersby or any other employer:

> ". . . to cease doing business with Frederick Construction Company, Garden Construction Corporation, members of Associated Builders and Contractors of Maryland, Incorporated, or any other open-shop contractors engaged in commercial, institutional, or industrial construction in Baltimore, Maryland, and vicinity; . . ." 125 NLRB at 1185.

By only the broadest stretch of the imagination could a group that includes *any* open shop contractor in Balti-

more, Maryland and vicinity be characterized, as has been done in the Board's brief, as including only entities in an "ongoing business relationship" with Selby. Clearly, the Board's Order encompassed and extended its protection to companies with whom Selby may never have had a prior business relationship, and which indeed may never have previously done business in the Baltimore area before entering an agreement with Selby for the first time. This is as much a future relationship as one could imagine. For the Board to call such a relationship an "ongoing or existing relationship" of any type does a disservice to the law and the Board's mission.

Section 8(f) was enacted to permit a contractor who had never done business in a particular area to enter into a prehire agreement with building trade unions in that area, in order to permit that contractor to bid with known costs and to draw from the readily available pool of local labor. Thus, Congress recognized that modern day contractors move rapidly about the country, performing work in areas where they previously may not have been engaged. Considering that Congressional accommodation, it is ludicrous to say that Selby could be foreclosed from doing business with such a company because it does not have an "ongoing business relationship" with that particular contractor or subcontractor. Stated differently, the descriptive language used in the Board Order does not refer to an ongoing relationship at all and cannot be given the restrictive interpretation currently urged by the Board in its brief. The Board's Order in *Selby* simply stated *that the Union cannot resort to coercive activity to prevent a future relationship (any future relationship) with a contractor active in Baltimore, Maryland and vicinity.*

The absurdity of the Board's position is evident from the following example. A national company such as Foster Wheeler Corporation or the Bechtel Corporation performs work throughout the United States. Therefore, if we were to substitute the name of such a firm for Selby-Battersby, would the Board assert that the prohibition of secondary activity against any subcontractor in the entire country (as such an Order would necessarily require), constitutes a readily identifiable group with whom the general contractor has an "ongoing business relationship". Obviously not! Therefore, it bears repeating that the Board's Order in Selby-Battersby makes no reference whatsoever to an ongoing business relationship and prohibits secondary coercive activity against *any* contractor active (or who should become active) in Baltimore, Maryland and vicinity. To say that it reads otherwise is absurd.

Thus, it is abundantly clear that the issue that the Board did not have to meet head-on in 1955, when it decided *Texas Industries,* was decided in *Selby-Battersby* in 1959. Thus, in the very words of the Board, the fact that the picketing ". . . sought to disrupt secondary relationships at a future time [did] not detract from or bar a finding of unlawful object under Section 8(b)(4)(A)".

Selby-Battersby clearly supports the position of the petitioners and the Chamber, that prior to the 1959 amendments strike pressure to obtain a "hot cargo" clause violated the secondary boycott provisions of the Act. Moreover, Congressional intent establishes that such pressure would continue to be unlawful following enactment of the amendments.

B. The legislative history of Section 8(e) and the construction industry proviso.

Section 8(e) outlawed all "hot cargo" agreements *even if voluntary in nature,* with two exceptions—the first, a sweeping exemption for the garment industry, exempting that industry from the prohibitions of both Section 8(e) and Section 8(b)(4)(B); the second, a more limited exception for the construction industry, permitting such voluntary agreements when applicable to work to be performed at the site of the construction and retaining the Section 8(b)(4) bar against coercive enforcement. *Therefore, building construction unions came away from the 1959 Congressional action as to this issue (the right to strike to obtain an 8(e) agreement) in exactly the same position they were in prior to those enactments.* They were saved from the outright ban of Section 8(e), but they neither gained nor lost protection. Congress, taking a photograph of the law as it then existed, simply preserved to labor organizations in the construction industry the same rights which they enjoyed under *Sand Door* and prior court and Board decisions preceding the enactment of Section 8(e). Then Senator John F. Kennedy specifically addressed this subject in the Congressional debates. He said:

> *"Since the [8(e)] provision does not relate to Section 8(b)(4) . . .*
>
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* (Emphasis added.) II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, 1433.

Senator Kennedy further stated:

> "The first proviso under new section 8(e) of the National Labor Relations Act is *intended to preserve the present state of the law* with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project." (Emphasis added.) II Legislative History of Labor-Management Reporting & Disclosure Act of 1959, 1433.

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting work to be done at a construction site. Congressman Barden said:

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (Emphasis added.) II Legislative History of Labor-Management Reporting & Disclosure Act of 1959, 1715.

Senator Kennedy was also careful to point out that the proviso did not change the law as enunciated by this Court in *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951):

> "This proviso affects only Section 8(e), and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341

U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, 1433.

The special treatment accorded the construction industry by the proviso to Section 8(e)—authorization to *voluntarily* enter into "hot cargo" agreements is comparable in nature to the special treatment of that industry conferred elsewhere in the amended Act. By the new Section 8(f), Congress likewise gave recognition to the special circumstances pertaining in the industry differentiating it from manufacturing and sales enterprises. Section 8(f) permits construction unions and employers to enter into *voluntary* prehire collective bargaining agreements and to make the union-security provisions of their contracts effective after only 7 days, practices which would otherwise constitute employer violations of Section 8(a)(1), (2) and (3) and union violations of Section 8(b)(1)(A) and (2). As the legislative history makes clear, Congress did not intend by Section 8(f) to legitimize strikes or picketing to coerce an employer's acceptance of these agreements.[7]

Is it at all logical to assume that the same Congress which carefully drafted Section 8(f), creating unusual new rights and protecting these rights against abuse by prohibiting coercion to obtain them in a primary setting,

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[7] H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. p. 42, I Leg. Hist. 946 (1959) ("Nothing in [8(f) is intended * * * to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such prehire agreements."); II Leg. Hist. 1715 (1959); cf. *Sperry* v. *Plumbers Local 562*, 210 F.Supp. 743, 747-748 (W.D.Mo. 1962) (holding that Section 8(f) provides no defense to an 8(b)(7)(C) charge); *N.L.R.B.* v. *Int'l Hod Carriers Union, Local 1140*, 285 F.2d 397, 403 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961).

would nevertheless allow coercion in an admittedly secondary situation? There is not one word of legislative history to support such a contention!

The legislative history of the 1959 amendments makes it clear beyond doubt that the status of the law was to be retained. Justice Brennan writing for the majority in *National Woodwork* buttresses this position by observing that "[P]rovisos were added to Section 8(e) to preserve the *status quo* in the construction industry and exempt the garment industry from the prohibitions of Section 8(e).[8]

Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court and presents the opportunity to cure the Board's error in the reversal of its unanimous decision in *Construction, Production and Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), rev'd in part, 323 F.2d 422 (9th Cir. 1963).

Denver Building Trades and *Moore Drydock*[9] retain their validity and are today the cornerstone of other major construction labor law concepts. See *N.L.R.B.* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975); *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667 (1961). The rule of each of these cases, recognizing the separate interests of each contractor and its employees on a construction project, would be very seriously eroded and eventually eradicated if unions in the construction industry were permitted to continue to *coercively* obtain agree-

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[8] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 637 (1967).

[9] *Sailors Union of the Pacific*, 92 NLRB 547 (1950).

ments of the type at issue here, which would apply across craft lines and at all future jobsites of the employer. Surely, if the Court sanctions the current state of the law, construction unions will have taken a giant step forward toward the achievement of those common situs objectives so long denied to them by Congress.[10]

C. The status of the law after the 1959 Amendments.

Subsequent to the 1959 amendments, *a unanimous five-member Board* in *Construction, Production and Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part, 323 F.2d 422 (9th Cir. 1963), held that it was unlawful to strike to obtain a subcontracting clause, even where such clause, if voluntarily entered, would be protected by the construction industry proviso. The Board followed that ruling in a long line of cases, including:

Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952 (1964).

Local 300, Hodcarriers Union (Fiesta Pools, Inc.), 145 NLRB 911 (1964).

Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279 (1963).

Southern Calif. District of Laborers (Swimming Pool Gunite Contractors), 144 NLRB 978 (1963).

Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49 (1963).

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[10] See, for example, H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

Essex County and Vicinity District Council of Carpenters, 141 NLRB 858 (1963).

Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249 (1963).

Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175 (1963).

Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946 (1963).

Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458 (1963).

Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236 (1962).

Local 60, United Association of the Plumbing & Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282 (1962).

Because some circuits rejected that view, in *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964), the Board reversed its position.[11] We submit, however, that the Board

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[11] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Essex County & Vicinity District Council of Carpenters & Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.*, 328 F.2d 534 (D.C.Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al.* v. *N.L.R.B.*, 328 F.2d 540 (D.C.Cir. 1964). See also, *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Unfortunately, at the time these circuit court cases were decided, the charging

(Footnote continued on following page)

correctly construed the statute in *Colson & Stevens* and that its subsequent reversal was in error.

It cannot be overemphasized that the five-member Board that unanimously decided *Colson & Stevens* (the so-called "Kennedy Board") is the very same Board that in less than one year departed from precedent favorable to management in thirteen cases, in some instances recalling decisions for reconsideration and ultimate reversal.[12] *Nevertheless, that same Board was of one mind in holding that only those "hot cargo" agreements which are the product of voluntary action are lawful under Section 8(e).* (Citing as an example of pre-1959 law: *Local 47, Teamsters*

(Footnote continued from preceding page)

party in a labor board proceeding was not considered a party for the purposes of review in the circuit courts, but merely an amicus curiae. Thus, if the Board chose not to seek certiorari, there was nothing the charging party could do on its own initiative. Not until the decision of this Court in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), was that situation corrected and the charging party granted standing to intervene in courts of appeals proceedings for the review or enforcement of labor board orders; and having intervened, to enjoy the status of a party with the right to seek certiorari independent of the Board. Thus, by the time *Scofield* was decided, no complaint would issue on this subject by the Board. Hence, there was no issue which could be litigated. It was literally bottled up until these post-*Connell* cases.

[12] See address by then Board member and former chairman, Boyd Leedom, before the Labor Law Section of the Illinois State Bar Association, January 19, 1962, and cases cited therein. (49 LRRM 84, 85) Member Leedom stated: "I have made an informal statistical survey of the decisions issued since April 14, 1961, the day that President Kennedy made his latest appointment to the Board. According to my figures, there has been departure from precedent in thirteen cases."

Union (Texas Industries, Inc.), 112 NLRB 923, enforced, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 NLRB 484, enforced, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, et al (Selby-Battersby & Company)*, 125 NLRB 1179 (1959).

In *Colson & Stevens*, the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the type . . ." here involved. 137 NLRB at 1651. The Board found that proposition explicit in *Sand Door*.

> "If, as there [in *Sand Door*], an agreement to require subcontractors to observe union standards, though legal, was not a defense to a charge of violating Section 8(b)(4)(A) by strikes or picketing, coercive pressure of a strike or picketing to obtain such an agreement would appear equally unlawful. In both situations the evil sought to be remedied is the cessation of business relationships by proscribed tactics." 137 N.L.R.B. at 1651.

Then, quoting Representative Barden's statement that the proviso would permit "voluntary agreements" and Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts excepted by the proviso, or *with respect to the legality of a strike to obtain such a contract*, the Board concluded:

> "Reading Section 8(e) together with section 8(b)(4)(A) in the light of the aforementioned statements by Senator Kennedy and Representative Barden, we conclude that the construction exemption in Section 8(e) was not intended to remove from the reach of Section 8(b)(4) picketing and other proscribed conduct which is designed to secure such contracts as are before us in this case. Under all the circumstances of this case, and particularly in view of our holdings in similar cases decided under Section 8(b)(4)(A) of the Act before the 1959 amendments, the retention of that section's language in the present Section 8(b)(4)(B), as explained above, and the strongly declared congressional purpose to prohibit the use of secondary pressure and economic force by unions to secure an objective such as Respondents sought by its picketing herein, we must find that Respondents' picketing of Colson violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act." 137 N.L.R.B. at 1652.

It is simply illogical to assume that the same Congress, which carefully drafted Section 8(f) of the Act[18] so as to prohibit coercion to obtain a pre-hire agreement from a primary employer, would allow coercion to obtain a protected "hot cargo" agreement in an admittedly secondary context. Furthermore, it makes no sense whatsoever to permit a union to shut down construction over a broad area, possibly covering many states and hundreds of sites disrupting the flow of commerce, valued perhaps in the billions of dollars, in an effort to *obtain* an 8(e) clause, while prohibiting that same union from striking one single job no matter how small to *enforce* the clause

[18] 29 U.S.C. Section 158(f).

once obtained. As the Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association,* 310 U.S. 534, 542-543; *Ozawa* v. *United States,* 260 U.S. 178, 194." (emphasis added) 137 NLRB at 1652, n. 7

In the instant cases, the Court has the opportunity to answer the question left unanswered in *Connell* and to restore the law to the congressional design and purpose so clearly mirrored in the legislative history of the 1959 amendments.

By permitting building trade unions to extract subcontracting agreements by coercive means, the Board and the circuit courts have overruled *Sand Door* and permitted massive unchecked secondary activity that runs counter to all the concerns and principles that are the underpinnings to *Denver Building Trades*[14], *General Elec-*

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[14] *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951).

tric,[15] *National Woodwork,*[16] and *Enterprise.*[17] This errant state of the law has fomented the problems which gave birth to *Connell* and its progeny.

Agreements such as would be permitted by the opinion of the court below tend to restrain competition in the nation's largest industry. Construction employers also find themselves thrust into potential antitrust settings in an effort to carry on their business without disruption. Thus, the opinion below cuts across the grain of construction labor law by fostering disruptions in an industry where common situs principles, the reserved gate doctrine, procedures for the resolution of jurisdictional disputes and the congressional authorization of prehire agreements, have all been developed to lessen friction and avoid stoppages. The thrust of each of these concepts is the protection of secondary parties. Once again, they must be reaffirmed.

Sand Door concepts, the legislative history of Section 8(e), and the unanimous postion of the so-called Kennedy Board during the 1959-1964 period all chart a clear path toward a return of the rule of *Colson & Stevens,* namely, that only voluntary "hot cargo" agreements are permitted by the construction industry proviso to Section 8(e) of the Act.

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[15] *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.,* 366 U.S. 667 (1961).

[16] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.,* 386 U.S. 612 (1967).

[17] *N.L.R.B.* v. *Enterprise Association, etc.,* 429 U.S. 507 (1977).

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is urged to reverse the decision of the Ninth Circuit in these cases, and to expressly hold that the construction industry proviso to Section 8(e) permits only voluntary "hot cargo" agreements.

Respectfully submitted,

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